Smoke House Restaurant, Inc. *and* Hotel Employees and Restaurant Employees Union, Local 11, AFL–CIO.[1] Cases 31–CA–026240, 31–CA–026418, and 31–CA–026285

December 15, 2017

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS MCFERRAN AND KAPLAN

On February 26, 2013, Administrative Law Judge John J. McCarrick issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Supplemental Decision and Order and to adopt the judge's recommended Order as modified and set forth in full below.[3]

Judge McCarrick ordered the Respondent to pay, with interest, approximately $1.25 million to the Union's Welfare Fund, approximately $213,000 to reimburse its employees for premiums they paid for health insurance coverage, and approximately $9600 to employee Lynne Pearson to reimburse her for out-of-pocket medical expenses. We affirm the two reimbursement awards,[4] but for the reasons stated below, we reverse the judge's award to the Union's Welfare Fund.

Background

This case is before the Board on exceptions to Judge McCarrick's supplemental decision. The supplemental decision addresses issues regarding the Respondent's compliance with remedies the Board ordered in the underlying merits decision, which issued in 2006 and which the Ninth Circuit enforced in 2009.[5] Before turning to the issues presented by the supplemental decision, we will provide some context by briefly summarizing the events that gave rise to this case as well as the Board's 2006 merits decision.

Smoke House Restaurant was established in 1946 and moved to its current location in Burbank, California, in 1949.[6] For some years prior to 2003, it was owned and operated by JLL Restaurant, Inc., d/b/a Smoke House Restaurant (JLL). Hotel Employees and Restaurant Employees Union, Local 11, AFL-CIO (Union) represented a bargaining unit of JLL's employees. JLL and the Union were parties to a collective-bargaining agreement (CBA) effective September 15, 1996, through September 14, 2001, and renewing automatically from year to year thereafter absent termination or reopening.[7] The CBA provided healthcare benefits for JLL's unit employees through the Union's Welfare Fund, and it required JLL to pay into the Welfare Fund at a contractually specified rate.

In 2002, JLL filed for bankruptcy. In February 2003,[8] Smoke House Restaurant, Inc. (Respondent) offered to purchase JLL's assets. On April 2, the Union contacted the Respondent and requested a meeting. The Respondent denied the request. On or about April 10, the Respondent and JLL executed a purchase and sale agree-

[1] The Charging Party is now known as UNITE HERE Local 11.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will modify the judge's recommended Order to conform to the Board's standard language for supplemental orders in compliance proceedings. In addition, we will omit certain remedies the judge erroneously included in his recommended Order: the compound interest remedy the Board adopted in *Kentucky River Medical Center*, 356 NLRB 6 (2010), and the tax-compensation and Social Security Administration–notification remedies the Board adopted in *Latino Express, Inc.*, 359 NLRB 518 (2012), reaffirmed in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101(2014), and revised in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). These remedies were not included in the Board's Order in the underlying unfair labor practice case, which was enforced by the Court of Appeals for the Ninth Circuit. Because the Board's Order was enforced by the court of appeals, we no longer have jurisdiction to modify it. See *Scepter, Inc. v. NLRB*, 448 F.3d 388, 391 (D.C. Cir. 2006) ("The Board obviously cannot modify an order . . . that the court has enforced in a final judgment."); *NLRB v. Gimrock Construction, Inc.*, 695 F.3d 1188, 1192–1193 (11th Cir. 2012) (same); *Interstate Bakeries Corp.*, 360 NLRB 112, 112 fn. 4 (2014).

[4] The Respondent did not except to the requirement in the judge's supplemental decision that it reimburse employees for their insurance premiums and out-of-pocket medical expenses. To the contrary, the Respondent acknowledged that the make-whole remedy in the Board's underlying order requires it to reimburse employees for "out-of-pocket premium and medical payments they individually incurred" (R. Exceptions Br. at 8). The Respondent did except to the General Counsel's calculation of the amounts of those out-of-pocket costs and expenses. We find those exceptions to be without merit.

[5] *Smoke House Restaurant*, 347 NLRB 192 (2006), enfd. mem. 325 Fed. Appx. 577 (9th Cir. 2009).

[6] See http://smokehouse1946.com/smokehouse_legacy.html (last visited Sept. 26, 2017).

[7] There is no evidence that either JLL or the Union ever terminated or reopened the CBA.

[8] All dates hereafter are in 2003 unless stated otherwise.

ment. On April 21 and 23, the Union picketed the restaurant, and some employees of JLL took part in the picketing. During and after the picketing, agents of JLL made statements to JLL's employees that violated Section 8(a)(1) of the Act.[9] Hard on the heels of these unlawful statements, a majority of JLL's unit employees signed a petition stating that they were choosing to end their relationship with the Union.

In early to mid-April, the Respondent interviewed prospective employees, including JLL's employees. During those interviews, the Respondent told JLL's employees that it was going to operate the restaurant as a nonunion enterprise.

JLL ceased operations and closed the restaurant on April 27. Just prior to closing the restaurant, JLL employed 70 bargaining-unit employees. The Respondent hired 63 of JLL's former unit employees.[10] On May 1, the Respondent opened the restaurant and commenced operations. At that time, almost all the Respondent's employees were former unit employees of JLL who were represented by the Union. The Respondent continued providing the same dining services in the same location for the same customer community, serving essentially the same types of food and using the same equipment, inventories, and facilities previously used by JLL.

On May 9, the Union requested recognition and bargaining. In reliance on the union disaffection petition signed by a majority of its employees, the Respondent refused the Union's request. The Respondent discontinued making payments into the Union's Welfare Fund that JLL had made in accordance with the CBA, and the Fund ceased furnishing healthcare coverage to the Respondent's unit employees.

- In its 2006 decision, the Board found and concluded in relevant part as follows.
  - The Respondent was a legal successor to JLL under the Supreme Court's decision in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).[11]
  - The disaffection petition signed by JLL's employees (subsequently hired by the Respondent) was tainted by JLL's unlawful statements to its employees. Thus, the Respondent could not rely on that petition to establish that the Union no longer enjoyed the support of a majority of employees in the bargaining unit.
  - The Respondent violated Section 8(a)(5) of the Act by refusing, on request, to recognize and bargain with the Union.
  - The Respondent violated Section 8(a)(1) of the Act by stating to JLL's employees during job interviews that it was going to operate the restaurant as a nonunion enterprise.
  - As a result of the latter statement, the Respondent forfeited the right of a *Burns* successor to set initial terms and conditions of employment, in accordance with *Advanced Stretchforming International*, 323 NLRB 529 (1997).[12]
  - Because the Respondent forfeited the right to set initial employment terms unilaterally, the Respondent violated Section 8(a)(5) when it unilaterally discontinued payments to the Union's Welfare Fund.[13]

To remedy the 8(a)(5) violations, the Board ordered the Respondent to (i) bargain with the Union, (ii) "retroactively

[9] Specifically, JLL's agents directed employees to cease picketing, threatened to discharge employees for engaging in union activity on nonworking time, interrogated employees about their union activity, threatened to discourage the Respondent from hiring employees because they engaged in union activity, threatened employees with job loss and closure of the restaurant because they engaged in union activity, and coerced employees into signing a union disaffection petition. The Board found that the Respondent was liable to remedy JLL's unfair labor practices under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). *Smoke House Restaurant*, 347 NLRB at 192 fn. 2.

[10] The General Counsel alleged that the Respondent violated Sec. 8(a)(3) of the Act by refusing to hire seven former employees of JLL. Administrative Law Judge Lana Parke found that the Respondent unlawfully refused to hire four of the seven, and Judge Parke dismissed the allegations regarding the other three. *Smoke House Restaurant*, 347 NLRB at 205–207. The Board adopted Judge Parke's findings, id. at 194-195, and the Ninth Circuit enforced them, *NLRB v. JLL Restaurant*, 325 Fed. Appx. at 578.

[11] Under *Burns*, supra, and *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), an employer that acquires, and continues in substantially unchanged form, the business of a unionized predecessor and hires as a majority of its workforce, or of a segment of its workforce constituting an appropriate bargaining unit, the predecessor's union-represented employees is deemed a legal successor to the unionized predecessor, and it must recognize and bargain with the unit employees' incumbent bargaining representative if and when that representative demands recognition or bargaining. Generally, however, a legal successor is not required to adopt its predecessor's terms and conditions of employment. Rather, the successor has the right to set its own initial employment terms and to do so unilaterally, i.e., without giving the union notice and opportunity to bargain.

[12] As stated above, a legal successor under *Burns* generally is not required to adopt its predecessor's terms and conditions of employment but has the right to set its own initial employment terms and to do so unilaterally. However, under *Advanced Stretchforming International*, supra, a successor forfeits this right if tells prospective employees that it will operate nonunion.

[13] Because the Ninth Circuit enforced the Board's Order, we are without authority to revisit the basis of the Board's finding that the Respondent violated Sec. 8(a)(5) when it discontinued payments to the Welfare Fund—i.e., the holding of *Advanced Stretchforming International* that a legal successor who announces an intention to operate nonunion loses its right under *Burns* to set initial employment terms. We express no views as to whether *Advanced Stretchforming International* was correctly decided in this regard.

restore" JLL's terms and conditions of employment, and (iii) make employees whole for any losses incurred as a result of the Respondent's unilateral cessation of contributions to the Welfare Fund.[14] Again, the Ninth Circuit enforced the Board's order.

Discussion

The instant proceeding is a compliance proceeding. Its purpose is to determine, and spell out in dollars-and-cents terms, exactly what the Respondent must do to fully comply with the Board's underlying 2006 order. The starting point of this determination is the language of the underlying order itself. Also, the Board's administrative law judges routinely include a "remedy" section in their decisions that further defines and clarifies the respondent's remedial obligations; and the Board, in its decision and order, may amend the remedy section of the judge's decision. Thus, in addition to examining the language of the underlying order itself, the Board in a compliance proceeding must also examine the remedy section of the judge's decision and any amendments the Board may have made to that section.

In the instant case, Judge Parke ordered the Respondent, in relevant part, to "retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective-bargaining agreement between JLL and the Union and make employees whole for any losses they incurred as a result of unilateral changes made thereto." *Smoke House Restaurant*, 347 NLRB at 209. The Board adopted the judge's order "as modified," id. at 192, but the Board did not modify the just-quoted remedy, see id. at 192 fn. 2 (modifying the judge's recommended order to comply with the remedial time limits set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996), and substituting new notices in accordance with the "plain language" directives in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), affd. 354 F.3d 534 (6th Cir. 2004)). The Board did not order the Respondent to make the Union's Welfare Fund whole.

The remedy section of the judge's decision is consistent with her order. When a judge orders make-whole contributions to one or more union funds, the remedy section of the decision typically includes a requirement that the respondent also pay additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[15] Thus, if the language of the order in the 2006 decision left any uncertainty whether Judge Parke or the Board intended to provide a make-whole remedy for the Union's Welfare Fund, a citation to *Merryweather Optical* in the remedy section of the judge's decision, or an amendment of the remedy section in the Board's decision to add a citation to *Merryweather Optical*, would have clarified the judge's and the Board's intentions. There is no citation to *Merryweather Optical* in the remedy section of the judge's decision.[16] There is no amendment of that section in the Board's decision adding a citation to *Merryweather Optical*.

After the General Counsel issued a compliance specification alleging that the Respondent owes $1.25 million, plus interest, to the Union's Welfare Fund, the Respondent filed an amended answer to the compliance specification pointing out that the Board's order did not include a remedy requiring payments to the Welfare Fund. Counsel for the General Counsel responded by filing a motion to strike this portion of the Respondent's amended answer, in which counsel attacked the Respondent's statement as follows:

> A core premise of Respondent's argument . . . flies in the face of clear language of the Board's Decision in denying "that the Board's 'make whole' order includes a provision to make retro-premium payments to the Trust Funds." On the contrary, the May 31, 2006 Board Decision clearly and unambiguously states that the make whole remedy is retroactive. The Board adopted the portion of the ALJ's Order recommending

---

[14] 347 NLRB at 209.

[15] Fn. 7 in *Merryweather Optical* reads, in relevant part, as follows:

> Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance state [sic] the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses.

[16] In relevant part, the remedy section of the judge's decision directs the Respondent to "make whole unit employees for losses resulting from its unlawful unilateral changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987)." There is no citation to *Merryweather Optical*. Moreover, just as there is no mention in the judge's recommended order of a make-whole remedy for the Union's Welfare Fund, so also there is no mention of such a requirement either in the remedy section of her decision or in an amendment of the remedy section in the Board's decision and order. In this regard, Judge McCarrick's supplemental decision mischaracterizes the Board's decision and order. He states that "[t]he Board directed . . . *contributions* and reimbursements to be computed as prescribed in *Ogle Protection Service*" (emphasis added). As we have just seen, however, neither Judge Parke nor the Board directed the Respondent to make any contributions to the Union's Welfare Fund.

> that "Respondent shall . . . . on request of the Union, ***retroactively*** restore the terms and conditions of employment of the employees in the unit as established by the collective bargaining agreement between JLL and the Union and make employees whole for any losses they incurred as a result of unilateral changes made thereto."

(Emphasis in original.) Counsel persuaded Judge McCarrick, who agreed with the General Counsel's argument, as does the dissent. But notwithstanding the General Counsel's whistling-past-the-graveyard overstatement, the Respondent's amended answer to the compliance specification does not "[fly] in the face" of the language of the Board's 2006 decision. To the contrary, the Respondent is exactly right.

Again, there is no mention of making the Union's Welfare Fund whole anywhere in the 2006 decision and order, nor is there any indirect indication—through citation of *Merryweather Optical*, supra—that the judge or the Board intended the order to encompass payments to the Welfare Fund. Moreover, the General Counsel's attempt to fabricate such a requirement out of language requiring the Respondent to "retroactively restore" the unit employees' terms and conditions of employment makes no sense. If the Respondent gives the Union's Welfare Fund $1.25 million (plus interest) now, this would *not* "retroactively restore" the unit employees' terms and conditions of employment as established by the collective-bargaining agreement between JLL and the Union. Specifically, such a payment would not "retroactively restore" unit employees' healthcare coverage under the Welfare Fund during the backpay period alleged in the compliance specification: May 2003 through August 2012. No payments to the Fund made *now* can "retroactively restore" healthcare coverage that did not exist during that nine-plus-year period. The Board has certain powers, but among them is not included the power to reverse time, go back to May 1, 2003, and create a parallel reality in which the employees never lost coverage under the Welfare Fund. Thus, the Board's order to "retroactively restore" the terms and conditions of employment established by the CBA between JLL and the Union cannot reasonably be read to require a make-whole award to the Welfare Fund that will not achieve such a retroactive restoration.

The dissent would find to the contrary, citing as authority *Wayne Stead Cadillac*, 303 NLRB 432 (1991). That case is inapplicable. Indeed, it did not even involve a make-whole remedy for a union benefit fund. In *Wayne Stead Cadillac*, the Board affirmed the judge's finding that the employer unlawfully discharged three employees. To remedy that violation, the judge ordered the employer, among other things, to offer the employees reinstatement "and make them whole for losses sustained by reason of the discrimination against them . . . as set forth in the remedy section of this decision." 303 NLRB at 440. In the remedy section of his decision, the judge said that the three employees were to be made whole "for any loss of earnings they may have suffered." Id. at 439. Excepting, the charging party union asked the Board to modify the judge's order "to include explicit reference to pension and health and welfare fund benefits." Id. at 432 fn. 3. The Board declined the request, stating that "the language in the judge's remedy is broad enough to encompass such relief." Id. Thus, the issue in *Wayne Stead Cadillac* was whether an order requiring the employer to make employees whole "for losses sustained by reason of the discrimination against them . . . as set forth in the remedy section of this decision" encompassed lost benefits as well as lost wages where the remedy section did not specifically refer to benefits. In other words, in *Wayne Stead Cadillac*, the issue was what the make-whole remedy for the employees included: wages only, or wages plus benefits? Here, in contrast, the issue is not what the make-whole remedy for employees includes, but whether a make-whole remedy for employees implies a remedy for a different recipient altogether, a union benefit fund. Thus, *Wayne Stead Cadillac* is inapposite—and common sense dictates that a remedy for employees does not and cannot imply a remedy for an entirely different nonemployee recipient, i.e., a union fund.

Moreover, even if the Board inadvertently omitted a make-whole remedy for the Union's Welfare Fund from the 2006 order, and even if we wished to correct that inadvertent omission now, we lack authority to do so. Again, the Board does not have jurisdiction to modify a court-enforced order. See fn. 3, supra. Because the Board's 2006 order did not contain a make-whole remedy for the Fund, and the Ninth Circuit enforced the Board's order, we are without jurisdiction to modify the court-enforced order by requiring the Respondent to pay into the Fund. Simply put, our hands are tied. Accordingly, we will issue an order limited to those amounts necessary to make the unit employees whole for their insurance premium payments and out-of-pocket medical expenses.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Smoke House Restaurant, Inc., Burbank, California, its officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amounts following their names, plus interest as

prescribed in *New Horizons*, 283 NLRB 1173 (1987), minus tax withholdings required by federal and state laws.

Employee	Make-whole amount
Arevalo, Sebastian	$2,672.06
Avila, Luis	$2,573.07
Banda-Cervantes, Rafael	$1,548.94
Buell, Elizabeth	$115.12
Bueno,Jose	$5,276.69
Colazzo-Martino, Christine	$545.70
Crimo, Yvonne	$5,395.06
Cuevas, Jose	$21,268.33
De La Cruz, Mary	$5,414.74
De La Luevanos, Eleazar	$3,397.83
Del Sol, Antonio	$1,093.86
Denniss, Judith	$3,611.74
Garcia, Alfredo J.	$220.75
Garcia, Rodolfo	$2,686.73
Hernandez, Jose Luis	$975.60
Herrera, Arturo	$1,765.88
Herrera, Jose A.	$5,572.96
Iuorno, Angela	$661.96
Lake, Michael	$903.54
Lima, David	$2,590.50
Lopez, Jason A.	$294.42
Lopez, Jose M.	$14,845.64
Lopez, Juan J.	$2,621.84
Lopez, Manuel	$2,522.81
Lowman, Kellie	$70.82
Martinez, Francisco	$1,367.31
Martinez, Ismael V.	$5,866.74
Martinez, Uriel	$5,967.90
McMillan, Gary	$5,507.16
Medina, Oscar	$175.32
Mendoza, Shelley	$3,068.47
Mier, Fernando	$8,073.33
Mier, Hector	$1,280.17
Munoz, Jose Luis	$1,832.11
Munoz, Leopoldo	$6,625.28
Munoz, Roman	$1,143.77
Nava, Sabino	$1,296.53
O'Leary Marcus	$3,139.77
Orozco, Ismael	$7,380.25
Ortiz, Alberto	$4,625.07
Oxenham, Alicia	$1,066.56
Pearson, Lynne	$11,349.23
Peinado, Paul	$145.35
Perez, Ramiro	$226.20
Puente, Jesus	$5,874.03
Puente, Rito	$8,136.54
Rodriguez, Hector	$521.92
SaIdana, Vicente	$2,082.74
Salomon, Hector M.	$6,470.49
Sanchez, Francisco	$2,648.33
Scott, Derrick	$694.00
Sheifer, Stephanie	$2,814.22
Solis, Alberto	$3,781.89
Solis, Elizondo	$5,975.71
Solis, Rosa	$260.80
Street, Linda	$14,723.25
Strutt, Rachel	$163.00
Suarez, Jose	$5,906.00
Valdez, Faustino	$3,397.83
Vasquez, Alfredo M	$967.47

Total: $223,201.33

Dated, Washington, D.C. December 15, 2017

Philip A. Miscimarra, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Unlike my colleagues, I would affirm the judge's finding that the Board's 2006 Order requires the Respondent to reimburse the Union's health and welfare trust fund for losses under the terms of the last collective-bargaining agreement in effect between the Respondent's predecessor and the Union.

In its original decision in *Smoke House Restaurant*, 347 NLRB 192 (2006), enfd. mem. sub nom. *NLRB v. JLL Restaurant, Inc.*, 325 Fed.Appx. 577 (9th Cir. 2009), the Board ordered the Respondent to, as relevant here, "retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective-bargaining agreement between JLL [the Respondent's predecessor] and the Union and make employees whole for any losses they incurred as a result of unilateral changes made thereto." The terms of that collective-bargaining agreement obligated the Respondent to contribute, on behalf of its employees, to the Union's

health and welfare trust fund; however, it is undisputed that the Respondent has failed to do so since 2003.

In my view, the "make employees whole" language in the Board's 2006 Order suffices to require the Respondent to reimburse the Union's trust fund as part of the relief ordered for employees, notwithstanding the absence of any specific reference to that fund in the Order. My colleagues disagree, emphasizing that neither the 2006 Order nor the judge's "remedy" discussion underlying that Order references the fund. But our precedent counsels against such an overly restrictive reading of the Order. In *Wayne Stead Cadillac*, for example, the Board found it unnecessary "to include explicit reference to pension and health and welfare fund benefits . . . because such fringe benefits are routinely includible under a make-whole order."[1] Thus, the 2006 Order supports requiring the Respondent to make all delinquent payments to the Union's trust fund, again for the benefit of the bargaining-unit employees.

My colleagues further object that the Board no longer has jurisdiction "to modify" its 2006 Order because it has been enforced by the Ninth Circuit.[2] But I am not advocating for a "modification" of the 2006 Order. Rather, consistent with our precedent and generally applicable legal principles, the Board need only "clarify" the terms of that Order to ensure that the employees receive full make-whole relief.[3] Notably, making this clarification would be consistent with both the Respondent's and the Ninth Circuit's understandings that the 2006 Order did require such payments to the Union's fund. In its brief to the court, the Respondent devoted no less than five pages to arguing that it should not be required to reimburse the trust fund (and did not so much as hint at the notion that the Order did not encompass the reimbursements).[4] The Ninth Circuit found that it was jurisdictionally barred from entertaining the Respondent's arguments, but stated that the Respondent could present at least some of these arguments to the Board in the compliance proceeding, thereby at least implicitly recognizing that such reimbursements fell within the scope of the Board's Order.[5]

Finally, there is no merit to my colleagues' argument that it would be illogical to clarify the Board's 2006 Order now to require reimbursement of the Union's fund. The purpose of ordering retroactive contributions to a health and welfare fund is not to retroactively provide employees with health coverage (which, as the majority notes, is impossible), but to protect the employees' future interests in an adequately funded trust fund.[6] We can accomplish that legitimate remedial objective today.

For those reasons, I would join the judge in requiring the Respondent to reimburse the Union's trust fund. Doing so is consistent with Board precedent, reflects the understanding of both the Respondent and the Ninth Circuit, and is necessary to make the employees whole.

Dated, Washington, D.C. December 15, 2017

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Nicole Pereira, Esq., for the Acting General Counsel.
Leon Jenkins, Vice President, of the Smokehouse Restaurant, Burbank, California, for the Respondent.
Ellen Greenstone, Esq. (Rothner, Segall, & Greenstone), of Los Angeles, California, for the Charging Party.
Kirill Penteshin, Esq. (UNITE HERE, Local 11), of Los Angeles, California, for the Charging Party.
Henry M. Willis, Esq. (Schwartz, Steinsapir, Dohrmann & Sommers), of Los Angeles, California, on behalf of UNITE HERE Trusts.

SUPPLEMENTAL DECISION

JOHN J. MCCARRICK, Administrative Law Judge. On May 31, 2006, the Board issued its Decision and Order[1] finding that Smokehouse Restaurant (Respondent) committed unfair labor practices including unlawfully failing to apply the terms of the collective-bargaining agreement between its predecessor, JLL Restaurant, Inc. (Predecessor) and Hotel Employees and Restaurant Employees Union, Local 11[2] (Union) and unilaterally changing terms and conditions of employment. The Board directed, *inter alia*, that Respondent retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective-bargaining agreement between Respondent and the Union, and make whole unit employees for losses resulting from Respondent's unlawful unilateral changes made thereto, contributions and reimbursements to be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed as prescribed

[1] 303 NLRB 432, 432 fn. 3 (1991).

[2] See generally *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006) (Once a Board order is enforced, the Board no longer has jurisdiction to modify it).

[3] See *Wayne Stead Cadillac*, above. Cf. *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 759 F.3d 1333, 1337 (Fed. Cir. 2014) ("The focus of the clarification-or-modification analysis is whether there were changes to the original injunction that 'actually altered the legal relationship between the parties.'").

[4] Brief of Respondent, 2008 WL 4678750.

[5] *JLL Restaurant, Inc.*, supra, 325 Fed. Appx. 577. I agree with the judge, however, that the court's statements on this point are dicta and that the Respondent's arguments cannot be raised for the first time on compliance.

[6] See generally *Arandess Management Co.*, 337 NLRB 245, 247 (2001).

[1] *Smoke House Restaurant*, 347 NLRB 192 (2006).

[2] Now known as Unite Here! Local 11.

in *New Horizons,* 283 NLRB 1173 (1987). Thereafter on May 12, 2009, the United States Court of Appeals for the Ninth Circuit issued its Memorandum and Judgment[3] enforcing the Board's Decision and Order.

This case was tried in Los Angeles, California, on September 25 and 26, 2012, upon the second amended compliance specification and notice of hearing, as amended (specification) issued on June 29, 2012, by the Regional Director for Region 31.[4] The specification alleges that Respondent owes contributions to the Los Angeles Hotel-Restaurant Employer-Union Welfare Fund (Trust Fund) pursuant to the terms of the collective-bargaining agreement between Respondent and the Union for the period set forth in appendix A to the specification. It is further alleged that Respondent owes medical expenses and insurance premiums to bargaining unit employees as set forth in appendix B to the specification.

On July 18, 2012, Respondent filed its answer to the compliance specification and in a rambling and obtuse manner denied that it owed bargaining unit employees reimbursement for medical expenses or insurance premiums or owed trust fund contributions to the Trust Fund.

Since the Court's judgment enforcing the Board's Order, Respondent has failed to comply with the Board's Order to reinstate the terms and conditions of employment as set forth in the collective-bargaining agreement.

The issues here for resolution are the amounts Respondent owes to the Trust Funds and the amounts owed to bargaining unit employees for medical expenses and health insurance premiums.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following:

FINDINGS AND CONCLUSIONS

A. Facts

1. The trust fund benefits

In its May 31, 2006 Decision and Order in *Smoke House Restaurant,* supra at 205, the Board affirmed the administrative law judge's April 6, 2004 Decision finding that Respondent was obligated to adopt the terms of its predecessor, JLL's collective-bargaining agreement as a consequence of Respondent's unlawful conduct in telling JLL employees that it would operate the restaurant without a union. Respondent was required to follow the terms and conditions of employment established by JLL's contract with the Union until a new agreement or impasse was reached. The administrative law judge found:

> As a consequence of Respondent's unlawful conduct in telling JLL employees it would operate the Restaurant without a union, Respondent lost the privilege of setting initial terms and conditions of its employees when it assumed control of the Restaurant on April 30. Instead, Respondent was required to follow the terms and conditions of employment established by JLL's contract with the Union until such time as Respondent negotiated a new contract with the Union or negotiated to impasse.

In *Smokehouse,* supra at 209, the Board affirmed the administrative law judge, who required Respondent to make whole employees for losses resulting from its unilateral changes:

> (b) On request of the Union, retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective-bargaining agreement between JLL and the Union and make employees whole for any losses they incurred as a result of unilateral changes made thereto.

The term of the collective-bargaining agreement between JLL and the Union was September 15, 1996, to September 14, 2001, with a clause providing for automatic renewal. There is no evidence that either party gave notice to terminate the collective-bargaining agreement. The agreement provided that Respondent was obligated to make health and welfare contributions to the health and welfare funds.[5] It is undisputed that since at least May 1, 2003, until the present, Respondent has made no contributions to the Trust Funds.[6]

It is undisputed that on December 1, 2003, Respondent implemented their own health care coverage requiring premium deductions from employee paychecks.[7]

The parties stipulated that the calendar quarters set forth in appendix A, column 1, of the second amended compliance specification represent the relevant calendar quarters during the liability period of May 1, 2003, through August 31, 2012.[8] May 1, 2003, is the date the Board found the unilateral changes took place.

The parties stipulated that the figures set forth in appendix A, column 2, of the second amended compliance specification accurately represent the hours worked by unit employees for each calendar quarter based on Respondent's payroll documents.

However, Respondent does not stipulate to the hours worked by employee Lynne Pearson (Pearson) on grounds that she was not an employee of Respondent during the relevant time period. Respondent presented no probative evidence to support this contention. Rather, the record reflects that Pearson, who worked for Respondent as a server, is listed on Respondent's payroll documents, and was paid for hours worked, during May 1, 2003, through January 2007, with the exception of the pay

[3] Ninth Circuit No. 07-74755, Unpublished Memorandum filed May 12, 2009.

[4] At the trial on September 25, 2012, counsel for the Acting General Counsel moved to amend the compliance specification by adding updated appendices A and B, reflecting revisions to the backpay contribution and backpay calculations found in the second amended compliance specification. The amendment was granted. Also on November 19, 2012, counsel for the Acting General Counsel filed a Motion to Amend Appendix B of the second amended compliance specification. Amended Appendix B does not change any of the data or the grand totals stated in AGC Exh. 12, it only provides subtotals for each of the affected employees. There being no opposition, the Motion is granted.

[5] Jt. Exh 1, attachment 8 at pp. 8–10.

[6] On April 1, 2012, the Trust Fund merged into UNITE HERE HEALTH.

[7] Jt. Exh. 1, attachment 4.

[8] Jt. Exh. 1.

periods during the third quarter of 2005, the fourth quarter of 2005, and the first quarter of 2006.[9]

Board Agent Danielle Pierce (Pierce), who is responsible for all of the compliance cases in Region 31, testified concerning the methodology she used in formulating and calculating the backpay liability owed to the Trust Fund. Pierce used May 1, 2003, for the backpay period to commence since the Board concluded that was when Respondent ceased making payments to the Trust. She made calculations for the calendar quarters through August 2012 based on payroll data supplied by Respondent, and determined that liability continues to accrue since Respondent has failed to date to reinstate the contractually required trust fund contributions. Pierce included the number of regular, overtime, and other hours worked by all bargaining unit employees that appear within Respondent's payroll documents, in each pay period, and added all those values for each pay period within each quarter. Pierce used the hourly rate per bargaining unit employee at which Respondent was obligated to make contributions as provided for in the JLL-Union collective-bargaining agreement, $1.43, for the entire backpay period. Pierce multiplied the hours worked, column 2 of appendix A, times rate, column 3 of appendix A to arrive at the gross total for each calendar quarter. The Board agent added all the gross totals, of each calendar quarter, to arrive at the total contributions, $1,250,118.36, owed to the Trust Fund.

2. The reimbursement of employees' health premiums

a. Health premiums

The parties stipulated that the employees listed in appendix B, column I of the compliance specification represent Respondent's bargaining unit employees who were employed by the Respondent for part or all of the period from December 1, 2003, through at least August 2012, and who paid health insurance premiums.[10] The parties further stipulated that the calendar quarters listed in appendix B, column 2 of the second amended compliance specification represent the relevant calendar quarters where employees paid health insurance premiums.[11] The backpay period begins on December 1, 2003, and runs through the end of August 2012.[12] Pierce testified that the only gaps in appendix B, column 2, occur where there were no premium deductions being made from the employee's pay during a given quarter. The parties stipulated that the figures set forth in appendix B, column 3, of the second amended compliance specification accurately represent the premium expenses paid by employees by payroll deduction for each calendar quarter of the contribution period based on Respondent's payroll documents.[13]

In appendix B, column 3, Pierce included payments deducted from each employee's paycheck for health insurance premiums during the relevant calendar quarter. These calculations were based upon Respondent's payroll documents from December 1, 2003, until July 2011. After July 2011, the Board agent used the Trust Fund's summary plan document and its attachments as well as the Respondent's payroll documents to determine the premium expenses listed in column 3. For all premium expenses after July 1, 2011, the Board Agent relied on an attachment to the Trust Fund summary plan description which reflected required employee premium contribution amounts and resulted in a monthly deduction to the premium costs.

The computed amount of backpay owed to the listed employees for reimbursement of health insurance premiums is $213,610.74.

b. Out-of-pocket medical expenses

Employee Lynne Pearson

Only Respondent's employee Pearson reported medical expenses. Pierce included all reimbursable medical expenses to her in appendix B, column 4 of the second amended compliance specification.[14] At the hearing, the parties stipulated that Pierce's calculations were accurate based on the underlying documents.

Pierce was unable to determine the specific health care plan that Pearson had selected prior to the Respondent's unilateral change in health care plans on December 1, 2003. However, under the Trust Fund plan, there were four medical plans offering different levels of coverage prior to and at the time of the Respondent's unilateral change.[15] Accordingly, Pierce selected the Kaiser plan B as the most representative plan as it offered the highest level of coverage to the employees. Under Kaiser plan B, employees were(?) had prescription drug coverage with a $10 prescription copay, payable by the employee.

Also under the Kaiser plan B option, dependents were covered at no cost to the employee. Pierce made this determination based on the language in the Trust Fund summary plan description[16] which does not require payment for dependents. Under the summary plan description dependents are defined as lawful spouses and unmarried children 19 years old or younger. Additionally, children over the age of 19 are covered under the Trust Fund plan if they are a disabled dependent.

Pierce determined that Pearson's backpay period ran from March 1, 2003, through January 2007, during the time she was employed by the Respondent and receiving paychecks according to Respondent's payroll documents.[17]

Pearson testified without contradiction, and I credit her testimony, that she paid for prescription drugs for herself. These expenses are set forth in a summary of her expenses she obtained from both CVS and COSTCO pharmacies.[18]

Pearson's Dependent Daughter[19]

During the backpay period, Pearson also paid for prescription drugs for her daughter. Pearson testified without contra-

[9] Id., attachment 4.
[10] Jt. Exh. 1.
[11] Id.
[12] GC Exh. 12.
[13] Jt. Exh 1.
[14] GC Exh.12.
[15] Jt. Exh. 1, attachment 7(a).
[16] Id.
[17] Jt. Exh. 1, attachment 4.
[18] GC Exhs. 5 and 7.
[19] Because of HIPPA medical information privacy concerns, Pearson's daughter's name was redacted from the exhibits received. However, I reviewed, in camera, unredacted copies of the daughter's medical records to verify that they were hers.

diction, and I credit her testimony, that her daughter was born in 1986, and has been diagnosed by her physicians with epilepsy, fibromyalgia, pain, muscle spasms, an overactive bladder, and allergies. In addition in about 2006, Pearson's daughter was found disabled based upon both epilepsy and fibromyalgia by the Social Security Administration and receives disability benefits.

Pierce determined that prior to May 1, 2003, Pearson's daughter was covered by two health insurance plans, Blue Cross Blue Shield and the Trust Fund plan. It was concluded that this concurrent insurance provided that any medical expenses incurred would first be covered by the primary insurance under the particular terms of that policy including deductibles and copays. The amount left over, rather than just being the patient's responsibility to pay, is covered by the secondary insurance policy.

Typically a dependent child would no longer be eligible for coverage over the age of 19 under the Trust Fund plan. However, according to the Trust Fund summary plan document, if a child is disabled the plan is not age limited. In view of her impairments and the Social Security Administration's finding of disability in 2006, Pierce reasonably made her calculations assuming that Pearson's daughter was disabled.

Pearson testified without contradiction that her daughter took prescription medications during the relevant backpay period. In addition, the Blue Cross Blue Shield explanations of benefits treatment records[20] for her daughter reflect that Pearson paid for numerous medical expenses for her daughter during the liability period. These included medical expenses where Pearson paid the deductible and copayment amounts. Similarly, Pearson paid the copayment amounts listed on CVS Pharmacy summary of prescription documents,[21] on behalf of her daughter, during the liability period. She also paid the copayment amounts listed on a Costco pharmacy statement,[22] on behalf of her daughter, during the liability period.

The medical expenses calculated for both Pearson and her daughter amount to $9,590.59, plus interest.

Pierce added the premium expenses, column 3,[23] amended appendix B, to the medical expenses, column 3, amended appendix B, to arrive at the premium & medical expenses owed to each employee for each calendar quarter. Pierce then added all the premium & medical expenses, to arrive at the grand total, $223,201.33, owed to bargaining unit employees.

B. Analysis

1. The legal framework

It has been well established where an unfair labor practice has been found, backpay is presumptively owed by the offending employer in a backpay proceeding. *La Favorita, Inc.,* 313 NLRB 902, 902 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995), citing *NLRB v. Maestro Plastics Corp.,* 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

It is the purpose of the compliance proceedings to restore the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices. *Hubert Distributors, Inc.,* 344 NLRB 339, 341 (2005); *Alaska Pulp Corp.,* 326 NLRB 522, 523 (1998), citing *Phelps-Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941).

The General Counsel's burden in a compliance proceeding is to demonstrate the gross amount of backpay due. In demonstrating gross amounts owed the General Counsel need not show an exact amount, rather an approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.), 3*01 NLRB 35, 36 (1991). The General Counsel's burden of proof is met by employing a formula designed to produce a reasonable approximation of what is owed. *Reliable Electric Co.,* 330 NLRB 714, 723 (2000).

While the Act provides the Board broad authority to fashion a make-whole remedy, this authority does not extend to the imposition of punitive measures. *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 12 (1940); *Aneco, Inc. v. NLRB,* 285 F.3d 326, 329 (4th Cir. 2002). Each backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 902–904 (1984).

a. Trust fund payments

The Board has long held that when a respondent unlawfully ceases making required contributions to benefit funds on behalf of employees, the appropriate remedy is to require that the fund be made whole for the missed payments. *Triple A Fire Protection, Inc.,* 357 NLRB 693, 695 (2011). A Respondent must make the trust funds whole on behalf of employees possessing a nonspeculative future economic interest in those funds. *Stone Boat Yard,* 264 NLRB 981, 983 (1982), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984). Where employees hold a nonspeculative interest in a pension or health fund, ordering Respondent to reimburse that fund is remedial because such contributions "insure the fund's financial viability necessary to satisfy employees' future *needs." Sedgwick Realty LLC and R & S Management A/K/A Arandess Mgt. Co.,* 337 NLRB 245, 247 (2001). The Board does not require employees to be certain to benefit from a trust fund before ordering contributions to that fund on their behalf. *Kenmore Contracting Co.,* 303 NLRB 1, 2 (1991). In *Kenmore Contracting Co.,* the Board stated, "The Board's established premise that such employees may have a future interest in the funds is sufficient linkage to warrant that the trust fund contributions be paid." Id.

In *Kraft Plumbing & Heating, Inc.,* 252 NLRB 891, 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), the Board set forth the remedy for a Respondent's unilateral discontinuance of contributions to benefit funds provided for in a collective-bargaining agreement and for reimbursement to employees for third party premiums paid to continue medical coverage:

> [M]ake whole the employees in the appropriate unit by transmitting the contributions owed to the Union's health and welfare, pension, industry and apprenticeship funds pursuant to the terms of its collective bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental or any other expenses ensuing from Respondent's unlawful failure to make such required contributions. This shall in-

[20] GC Exh. 6.
[21] Id.
[22] Id.
[23] GC Exh. 12.

> clude reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare, pension, industry and apprenticeship funds after Respondent unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of Respondent's required contributions to such funds.

b. Medical expenses

The Board has held that employees should be made whole for expenses they incurred due to the loss of medical insurance due to a respondent's unlawful action. Reimbursement includes costs employees paid for medical services that would have been reimbursed under terms of respondent's medical insurance plan. *Goya Foods of Florida,* 356 NLRB 1461, 1464 (2011).

Additionally, respondents must reimburse employees for premiums paid to maintain comparable health insurance, to the extent the premiums exceeded those paid when employed prior to the unlawful conduct. See *RMC Constructors,* 266 NLRB 1064, 1066 (1982).

In *Kraft Plumbing & Heating, Inc.,* supra, the Board also held that employees were entitled to reimbursement for, "any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered. All payments to employees shall be made with interest."

2. Respondent's defenses

Respondent raised numerous defenses to its backpay liability, none of which have merit.

a. Ninth Circuit law is binding in this proceeding

Respondent contends that this proceeding is bound by the unpublished Memorandum Decision[24] of the Ninth Circuit Court of Appeals in the enforcement action in *Smokehouse Restaurant,* supra.

In its Memorandum Decision at page four, the Court noted:

> We lack jurisdiction to review Smoke House's challenges to certain remedies ordered by the Board. See *NLRB v. Sambo's Restaurant, Inc.*, 641 F.2d 794, 795–796 (9th Cir. 1981) (applying jurisdictional bar to issues or remedies). As the government points out, however, we note that following the Board's decision in this case, it has established a compliance proceeding action to determine the ultimate amount of Smoke House's financial liability under the "make whole" order, and to align "make whole" orders with Ninth Circuit Law. See *Planned Building Services, Inc.*, 347 NLRB [670, 710] fn. 23 [(2006)] (citing *Advanced Stretchforming*, 233 F.3d 1176, 1181–1183 (2000); *Kallmann v. NLRB*, 640 F.2d 1094, 1102–1103 (9th Cir. 1981). In that proceeding, Smoke House may present its arguments regarding whether the expired collective bargaining agreement's provisions regarding medical benefits had already been changed by JLL, whether Smoke House would have agreed to the terms of the previous collective bargaining agreement, and when it would have reached an agreement on new terms with the union or reached a bargaining impasse.

Notwithstanding the footnote by the Ninth Circuit panel noting that its Memorandum Decision was of no precedential value, the Court was without jurisdiction in the enforcement proceeding to consider issues of remedy. Accordingly, the Court's pronouncement that Respondent could present evidence concerning the predecessor collective bargaining agreement as well as the standard for formulating an appropriate remedy in the compliance proceeding were dicta and not binding in this proceeding.

Moreover, an administrative law judge is required to follow established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

b. The Board's Decision and Order does not require Respondent to make the trusts whole

In Respondent's answer to the second amended compliance specification as well as in its brief, it contends that the Board's Order does not require Respondent to pay back premiums to the Trust Fund. While the Board Order does not explicitly require the Respondent to make the Trust Funds whole, the Board's Order implicitly contains such a requirement. As the Board found in *Triple A Fire Protection, Inc.,* 357 NLRB 693, 695 (2011), when a respondent unlawfully ceases making required payments to benefit funds on behalf of employees, the appropriate remedy is to require that the fund be made whole for the missed payments.

Here the Board found respondent violated the Act when it failed to apply the predecessor's collective-bargaining agreement to bargaining unit employees. The Board specifically ordered Respondent to make whole employees for losses resulting from its unilateral changes:

> (b) On request of the Union, retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective-bargaining agreement between JLL and the Union and make employees whole for any losses they incurred as a result of unilateral changes made thereto.

The employee losses included lost medical benefits due to Respondent's failure to make trust fund payments. In order to restore the status quo, Respondent must make trust fund payments in order to restore employee benefits under the trusts.

c. Unit employees do not possess a nonspeculative interest in the trust

Respondent contends that the General Counsel has failed to establish that Respondent's employees possess a nonspeculative future economic interest in the trust funds.

A Respondent must make the trust funds whole on behalf of employees possessing a non-speculative future economic interest in those funds. *Stone Boat Yard,* 264 NLRB 981, 983 (1982), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984). Where employees hold a nonspeculative interest in a pension or health fund, ordering Respondent to reim-

[24] GC Exh. 1(c).

burse that fund is remedial because such contributions "insure the fund's financial viability necessary to satisfy employees' future *needs." Sedgwick Realty LLC & R & S Management A/K/A Arandess Mgt. Co.,* 337 NLRB 245, 247 (2001). The Board does not require employees to be certain to benefit from a trust fund before ordering contributions to that fund on their behalf. *Kenmore Contracting Co.,* 303 NLRB 1, 2 (1991). In *Kenmore Contracting Co.,* the Board stated, "The Board's established premise that such employees may have a future interest in the funds is sufficient linkage to warrant that the trust fund contributions be paid." Id.

Here Respondent's own payroll records[25] together with the terms and conditions of employment in its predecessor's collective-bargaining agreement[26] with the Union and the trust health plan summary[27] establish that Respondent's employees were entitled to health care coverage under the trust.

Respondent's reliance on *Centra, Inc.,* 314 NLRB 814, 818–820 (1994), and *Lawrenceville Ready-Mix Co*., 305 NLRB 1010 (1991), for the proposition that its employees do not possess a nonspeculative interest in the trust fund is misplaced. *Centra,* supra at 819, found that present employees in the bargaining unit, who through a collective-bargaining agreement were covered by the extant health plans, had a nonspeculative interest in the vitality of the health trust. *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 201 (1990), is also distinguishable since the employees in that bargaining unit were no longer represented by the union and had disclaimed interest in the trust funds. Similarly, *Lawrenceville Ready-Mix Co*., 305 NLRB 1010 (1991), is not persuasive. In that case, the entire purpose of the Board's remand was to inquire whether the employer concluded an agreement effective on or before the date it discontinued payment into the union-negotiated health and welfare plan. Such proof, if any, would limit the employer's obligation to benefits paid out by the fund before execution of the alleged agreement. Likewise *Sedgwick Realty LLC and R & S Management A/K/A Arandess Mgt. Co.,* supra, is of no avail to Respondent since, unlike here, the Board found the employees in *Sedgwick* were not covered by the health care plan and thus had no nonspeculative interest.

I find that Respondent's employees possess a nonspeculative interest in the trust fund.

d. Failure to calculate accurately employee premium and medical expenses

Respondent's argument in its brief is not clear. I cannot determine if Respondent is contending that the calculations for premium expenses employees paid for the Respondent's unilaterally imposed health care plan and out-of-pocket medical expenses are inaccurate or if Respondent is referring to the contribution amounts it was required to pay to the trust. If Respondent is referring to the premium payments employees were required to make for the Respondent's unilaterally imposed health care plan, those amounts were stipulated to in Joint Exhibit 1, paragraph 17. If Respondent is referring to trust fund contributions it is irrelevant what health care plan employees may have chosen. Again Respondent stipulated to the hours worked by unit employees during the relevant backpay period. The collective-bargaining agreement between JLL and the Union establishes the amount per hour Respondent was required to contribute, $1.43. Moreover, only one employee, Lynne Pearson claimed out-of-pocket medical expenses, as discussed below. Respondent is apparently of the impression that the General Counsel must establish that the trusts actually made payments of medical expenses for employees during the backpay period or somehow establish that Respondent's unilaterally imposed medical plan would have offset employee costs. This is ludicrous. Since no trust contributions were made by Respondent, its employees were not enrolled in any trust fund covered plans after May 1, 2003.

Respondent stipulated that appendix B, column 3, of the second amended compliance specification accurately represent the premium expenses paid by employees for each calendar quarter of the backpay period. Moreover there was no evidence adduced by Respondent that any health care premiums paid by unit employees did not occur until after December 1, 2008. Before May 1, 2003, employees made no payments for health care premiums. The Trust Fund summary [lan description does not mention any employee contributions only employer payments.

Respondent's argument that the General Counsel failed to accurately calculate employer hourly contributions to the trusts, or employee premiums and medical expenses fails. I find that back pay is owed to the listed employees for monthly premiums paid are in the amount of $213,610.74.

e. Respondent's predecessor JLL and the Union reached impasse or changed the terms of the predecessor's collective-bargaining agreement prior to May 1, 2003

Based upon the Ninth Circuit's Memorandum Decision, Respondent contends that it may raise as an affirmative defense that the expired collective-bargaining agreement provisions regarding health care benefits had already been changed by its predecessor JLL in 2002. Notwithstanding my finding that the Ninth Circuit's Memorandum Decision, insofar as it addressed compliance issues, is dicta and therefore not binding, issues litigated and decided in an unfair labor practice proceeding may not be re-litigated in the ensuing backpay proceeding. *Paolicelli,* 335 NLRB 881, 883 (2001). In *Smoke House Restaurant,* 347 NLRB 192 (2006), the Board found that in 2003 the Respondent unlawfully failed to apply the terms of the collective-bargaining agreement between JLL and the Union and unilaterally changed terms and conditions of employment. Since the Board has already determined that the collective-bargaining agreement remained in effect as to Respondent, Respondent's assertion that JLL changed the collective-bargaining provisions regarding health care or that JLL and the Union reached impasse prior to May 1, 2003, cannot be re-litigated in this proceeding.

f. An impasse existed between Respondent and the Union after May 1, 2003

Respondent takes the position that Respondent would not

[25] Jt. Exh. 1, attachment 4.
[26] Id. at attachment 8.
[27] Id. at attachment 7.

have agreed to the economic terms of the previous collective-bargaining agreement and that it reached impasse with the Union, citing *Planned Building Services,* 347 NLRB 670, 676 (2006).

In *Planned Building Services,* the Board reviewed what the appropriate make-whole remedy was when a successor employer discriminatorily denied employment to its predecessor's employees and violated its duty to bargain by unilaterally setting initial terms and conditions of employment. In *Planned Building Services,* the Board modified its traditional make-whole remedy. The Board, supra at 676, stated its new formula in successorship cases:

> Accordingly, we will issue an order consistent with our traditional remedy in cases like this one. But we will then permit the Respondent, in a compliance proceeding, to present evidence establishing that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. (Fn. omitted.)

Of course application of this formula presumes that the parties are engaged in good-faith bargaining. The trier of fact is to speculate if and when impasse would have been reached, or when a respondent would not have agreed to the economic terms of a predecessor's collective-bargaining agreement. The burden is on the Respondent to establish the elements set forth in *Planned Building Services.*

However, where there are unremedied unfair labor practices, the Board has held that there can be no impasse. In *Titan Tire Corp.*, 333 NLRB 1156, 1159 (2001), the Board concluded that unremedied unfair labor practices, including refusal to furnish information during bargaining, precluded a finding that the parties had reached impasse. Thus the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its final offer.

In the instant case Respondent has failed and refused for over 6 years to comply with the Board's Order that it remedy its unfair labor practices, including restoring the terms and conditions of employment established in its predecessor's collective-bargaining agreement with the Union. Rather, the record reflects that it has engaged in a game of delay. Respondent has refused to reimburse the trust funds for over 9 years of contributions but has attempted to condition further bargaining upon the Union compromising the amount of contributions ordered by the Board.[28] Respondent's refusal to date to remedy the unfair labor practices found by the Board, particularly reinstating the terms and conditions of employment established under its predecessor's collective-bargaining agreement with the Union, goes to the heart of good-faith bargaining and precludes a finding that Respondent and the Union could have ever reached a good faith impasse.

However, I allowed Respondent to adduce evidence subsequent to May 1, 2003,[29] in order to meet the requirements in *Planned Building Services* that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals.

Respondent's arguments to the contrary, I find no probative evidence that the parties reached impasse, entered into a collective-bargaining agreement or that Respondent established it would not have agreed to the economic terms of the predecessor collective-bargaining agreement.

The record reflects that between May 1, 2003 and 2007, there were several meetings between Respondent and union representatives.

At a meeting on May 1, 2003, health care issues were discussed. Respondent's Chief Financial Officer Leland Spencer (Spencer) stated that Respondent could not tell the Union what their position on health care coverage would be until Respondent determined their financial status in the next 3 to 6 months.

At another meeting in June 2003, the Union requested that Respondent resume making contributions for health insurance and to negotiate a new contract. Spencer told the Union that the Respondent could not make such a decision until they knew what the restaurant's financial future was going to be. In addition Spencer told the Union that Respondent would not make trust contributions for health insurance until its financial status was clear.

At a meeting in May 2004, Respondent claims they presented the Union with a new contract proposal. However, no contract was offered into the record.

There is no evidence of any negotiations between the parties from 2004 to 2006. Spencer claims there was a meeting at an unknown time in 2007. Respondent admitted that no agreement was ever reached with the Union. This evidence is insufficient to meet Respondent's burden under *Planned Building Services* to establish that an impasse was or would have been reached.

There was considerable correspondence between the Union and Respondent during the period May 2003 to 2010. See Joint Exhibits 1 and 2 and Respondent's Exhibits L, R-HH. Most of the correspondence deals with demands for reinstatement of the terms and conditions of employment contained in the JLL collective-bargaining agreement and whether there could be good-faith bargaining until Respondent had fully remedied its unfair labor practices as found by the Board and Court. There is no dispute that Respondent failed to reinstate health care contributions to the trust fund. There is no evidence of any meaningful or good-faith bargaining in the correspondence.

While Respondent contends that they tendered premium payments to the Trust Fund for coverage of unit employees on July 9, 2007, these premiums were rejected by the Union and the Trust Fund. The amount tendered did not represent any-

[28] See R. Exhs. T, X, Y, Z, HH, BB-1, CC, EE, FF, GG.

[29] While I initially ruled that no evidence of impasse prior to January 2004, the date of the trial before Judge Parke, would be received (Tr. p. 34, LL. 11–18 and p. 35, LL. 4–8), I later allowed Respondent to offer evidence of negotiations between it and the Union after May 1, 2003 (Tr. p. 209, LL. 13–19).

thing approaching the full amount owed to the Trust Fund for the period May 1, 2003, to July 9. 2007, but represented only 5 months of contributions. Spencer admitted that the trust fund did not cash checks the Respondent tendered and coverage was never reinstated to the employees and employees could not individually apply for benefits under Trust Fund rules and regulations.

Respondent has presented insufficient evidence to meet its burden under *Planned Building Services* to demonstrate that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement. Spencer's testimony that he could not tell the Union what their position on health care coverage would be until Respondent determined their financial status in the next 3 to 6 months nor telling the Union that the Respondent could not make a decision on reinstating health care coverage until they knew what the restaurant's financial future was going to be is too uncertain for me to conclude that Respondent would not have accepted the economic terms of the collective-bargaining agreement. There is no other evidence concerning Respondent's financial condition. I refused to receive into evidence a 2009 profit and loss statement[30] of Respondent. There is no evidence that there was any ongoing bargaining between the Union and Respondent in 2009. Further there is no evidence that Respondent claimed they were unable to meet any of the Union's economic demands due to economic circumstances. Finally the Respondent's isolated 2009 profit and loss statement, standing alone, does not establish that Respondent would not have met the economic terms of its predecessor's collective bargaining during the period 2003 to the present. There is no evidence in this record that Respondent at any time told the Union that its financial position precluded it from meeting the Union's economic terms.

Furthermore, as noted above, Respondent presented insufficient evidence to establish when it would have bargained to good-faith impasse and implemented its own monetary proposals. There is simply no evidence of good-faith bargaining in this case. Likewise, Respondent presented insufficient evidence to establish that after May 1, 2003, it and the Union reached an impasse in negotiations on any subject so that it was free to enact its last best offer. *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967).

g. It would be punitive to have a make-whole remedy beyond the expiration of the collective-bargaining agreement

Respondent cites Ninth Circuit cases for the proposition that there can be no make-whole remedy beyond the term of a collective-bargaining agreement. *NLRB v. Advanced Stretchforming International, Inc.,* 233 F.3d 1176, 1182 (9th Cir. 2000); *Rayner v. NLRB,* 665 F.2d 970, 976 (9th Cir. 1982); *Kallmann v. NLRB,* 640 F.2d 1094 (9th Cir. 1981); *NLRB v. Dent*, 534 F.2d 844 (9th Cir. 1976).

The Board's traditional remedy in cases where a successor, because it has committed unfair labor practices, is not allowed to set initial terms and conditions of employment is to order restoration of those terms and conditions of employment until a new agreement or impasse has been reached. *State Distributing Co.*, 282 NLRB 1048, 1048 (1987). In *Planned Building Services,* 347 NLRB 670, 676 (2006), the Board modified this remedy, acknowledging that some courts of appeals, including the Ninth Circuit in the *Kallman* line of cases have rejected this remedy as punitive. Thus the Board established a new test for remedies in these cases providing that respondents may offer evidence to establish, inter alia, when and if a collective-bargaining agreement or impasse would have been reached.

As noted above, an administrative law judge is required to follow established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

Since *Planned Building Services* has not been reversed by the Supreme Court, I am bound to follow it even though it may be inconsistent with Ninth Circuit law. Therefore, Respondent's argument must fail.

h. GC and Union impeded negotiations

Respondent contends that the General Counsel and the Union impeded negotiations and caused an impasse by contending that there could be no bargaining until Respondent made the trust fund whole pursuant to the Board's Order herein.

Respondent's argument is wholly lacking in merit. It is irrelevant what position the Union took with respect to compliance. This proceeding does not contemplate the merits of an unfair labor practice. I have already found that no impasse could have taken place in this case where Respondent had unremedied unfair labor practices outstanding. Moreover, alleged misconduct of a charging party is not a defense in an unfair labor practice proceeding. *Greyhound Lines*, 319 NLRB 554, 555–557 (1995). Further, there is absolutely no evidence of any misconduct on the part of the General Counsel, only an insistence that Respondent fully remedy unfair labor practices found by both the Board and the Court. Respondent's own recalcitrance to abide by the law is the sole cause of trust payments having continued to accrue for over 9 years.

i. Pearson is not an employee

As noted above, the evidence establishes that Pearson held the position of server at Respondent's restaurant both before and during the relevant backpay period. Respondent provided no probative evidence that Pearson was not its employee. Respondent's own payroll records show that she was receiving paychecks from the Respondent from May 1, 2003, through January 2007, with the exception of the third and fourth quarter of 2005, and first quarter of 2006. Respondent's argument is without merit.

j. Pearson's expenses

Respondent contends that the General Counsel failed to establish the out-of-pocket medical expenses of Pearson. Respondent's argument that Pearson failed to provide evidence that an alleged Workers Compensation settlement or an alleged private mold lawsuit compensated her for her out-of-pocket medical expenses turns the law on its head. First, there is no evidence of any award in any Worker's Comp claim for pre-

[30] R Exh. MM.

scription drugs nor, despite Respondent's misrepresentation of the record, is there any evidence of a settlement of a private mold lawsuit providing for prescription drug payments to Pearson or members of her family. It was Respondent's burden to establish an offset against Pearson's claimed out-of-pocket medical expenses, and Respondent has failed to satisfy that burden.

Contrary to Respondent's contention, Pearson did provide evidence of her out-of-pocket medical expenses. While Pearson no longer has original receipts for prescriptions or medical treatment, she had probative written summaries from both her pharmacies where she purchased prescription drugs and from her health care provider for treatment. Respondent's argument that these documents do not comport with Federal Rules of Evidence are misplaced. First the records appear to be documents kept by both the pharmacies and health care provider in the regular course of business. Pearson testified credibly that she herself obtained these records from her pharmacies and medical provider. Moreover, after 9 years Respondent should not be able to profit from the absence of Pearson's original bills and preclude Pearson's recovery of out-of-pocket medical costs caused by Respondent's wrongdoing.

Finally, Respondent fails to understand that it just makes no difference what trust health plan Pearson was covered by before Respondent ceased making trust contributions. The General Counsel does not have to show that if Respondent's employees were still covered by one of the trust health plans they would have had more or less out-of-pocket expenses. Respondent's employees as a result of Respondent's unfair labor practices were without trust coverage.

k. Respondent's inability to pay

In Respondent's answer to the second amended compliance specification[31] they raise an affirmative defense that to require Respondent to pay approximately $1,663,916.81 in back payments to the Trust Funds would be unnecessarily harsh, punitive, and unfair to Respondent, and create an undue hardship forcing the restaurant to close, and declare bankruptcy.

This argument addresses an issue I cannot resolve. In a compliance proceeding, the judge simply quantifies respondent's existing burden. The judge has no authority to increase or reduce a respondent's liability but simply has the responsibility to measure it. A respondent's inability to pay does not constitute a defense to the determination of backpay liability. *Star Grocery Co.,* 245 NLRB 196, 197 (1979); *Coal Rush Mining, Inc.,* 341 NLRB 32, 33 fn. 2 (2004). Accordingly, the evidence Respondent offered to support its inability-to-pay argument is immaterial to any issue properly before me and I reject Respondent's defense without regard to that evidence.

Based on the record as a whole, I conclude that the General Counsel has proven the allegations raised in compliance specification paragraphs I and II, as modified by General Counsel's Exhibits 11 and 12.

Calculations

This supplemental decision addresses the periods alleged in the specification, May 1, 2003, through August 2012, for Trust Fund payments and December 1, 2003, through August 2012, for premium and medical expenses. Respondent will satisfy its make-whole obligations for this period by payment of the following amounts, together with interest:

[31] GC Exh. 1(u).

Employee	Premium Expenses	Medical Expenses	Total
Arevalo, Sebastian	$2,672.06		
Avila, Luis	$2,573.07		
Banda-Cervantes, Rafael	$1,548.94		
Buell, Elizabeth	$115.12		
Bueno,Jose	$5,276.69		
Colazzo-Martino, Christine	$545.70		
Crimo, Yvonne	$5,395.06		
Cuevas, Jose	$21,268.33		
De La Cruz, Mary	$5,414.74		
De La Luevanos, Eleazar	$3,397.83		
Del Sol, Antonio	$1,093.86		
Denniss, Judith	$3,611.74		
Garcia, Alfredo J.	$220.75		
Garcia, Rodolfo	$2,686.73		
Hernandez, Jose Luis	$975.60		
Herrera, Arturo	$1,765.88		
Herrera, Jose A.	$5,572.96		
Iuorno, Angela	$661.96		
Employee	Premium Expenses	Medical Expenses	Total
Lake, Michael	$903.54		
Lima, David	$2,590.50		
Lopez, Jason A.	$294.42		
Lopez,Jose M.	$14,845.64		
Lopez, Juan J.	$2,621.84		
Lopez, Manuel	$2,522.81		
Lowman, Kellie	$70.82		
Martinez, Francisco	$1,367.31		
Martinez, Ismael V.	$5,866.74		
Martinez, Uriel	$5,967.90		
McMillan, Gary	$5,507.16		
Medina, Oscar	$175.32		
Mendoza, Shelley	$3,068.47		
Mier, Fernando	$8,073.33		
Mier, Hector	$1,280.17		
Munoz, Jose Luis	$1,832.11		
Munoz, Leopoldo	$6,625.28		
Munoz, Roman	$1,143.77		
Nava, Sabino	$1,296.53		
O'Leary Marcus	$3,139.77		
Orozco, Ismael	$7,380.25		
Ortiz, Alberto	$4,625.07		
Oxenham, Alicia	$1,066.56		
Pearson, Lynne	$1,758.64	$9,590.59	$11,349.23
Peinado, Paul	$145.35		
Perez, Ramiro	$226.20		
Puente, Jesus	$5,874.03		
Puente, Rito	$8,136.54		
Rodriguez, Hector	$521.92		
SaIdana, Vicente	$2,082.74		
Salomon, Hector M.	$6,470.49		
Sanchez, Francisco	$2,648.33		
Scott, Derrick	$694.00		
Sheifer, Stephanie	$2,814.22		
Solis, Alberto	$3,781.89		
Solis, Elizondo	$5,975.71		
Solis, Rosa	$260.80		
Street, Linda	$14,723.25		

Strutt, Rachel	$163.00		
Suarez, Jose	$5,906.00		
Valdez, Faustino	$3,397.83		
Vasquez, Alfredo M	$967.47		

Grand Total:	**$213,610.74**	**$9,590.59**	**$223,201.33**
Grand total premium expenses:	**$213,610.74**		
Grand total medical expenses:	**$9,590.59**		
Grand total funds contributions:	**$1,250,118.36**		
Grand total premium expenses, medical expenses and fund contributions:	**$1,473,319.69**		

REMEDY

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012).

Respondent will discharge its make-whole obligations, for the periods alleged in the compliance specification, May 1, 2003, through August 2012, for Trust Fund payments and December 1, 2003, through August 2012, for the premium and medical expenses, together with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[32]

ORDER

It is hereby ordered that Respondent, Smoke House Restaurant, Inc., its officers, agents, successors, and assigns, shall pay the individuals named above under the heading "Calculations" the amounts specified therein, together with interest as prescribed in New Horizons, above.

Dated, Washington, D.C. February 26, 2013

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.